



UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

JAMES D. OFELDT,
#81842

Plaintiff,

vs.

STATE OF NEVADA, *et al.*,

Defendants.

3:10-cv-00642-ECR-VPC

ORDER

This is a prisoner civil rights action. Plaintiff has filed a motion to strike the State of Nevada and the Nevada Department of Corrections ("NDOC") as defendants (docket #6). Defendants filed their non-opposition to the motion (docket #7). Plaintiff's motion is granted. The court now reviews the complaint.

I. Screening Standard

Federal courts must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. *See* 28 U.S.C. § 1915A(a). Pursuant to the Prisoner Litigation Reform Act (PLRA), federal courts must dismiss a prisoner's claims, "if the allegation of poverty is untrue," or if the action "is frivolous or malicious," "fails to state a claim on which relief may be granted," or "seeks monetary relief against a defendant who

1 is immune from such relief.” 28 U.S.C. § 1915(e)(2). A claim is legally frivolous when it lacks an
2 arguable basis either in law or in fact. *Nietzke v. Williams*, 490 U.S. 319, 325 (1989). The court may,
3 therefore, dismiss a claim as frivolous where it is based on an indisputably meritless legal theory or
4 where the factual contentions are clearly baseless. *Id.* at 327. The critical inquiry is whether a
5 constitutional claim, however inartfully pleaded, has an arguable legal and factual basis. *See Jackson*
6 *v. Arizona*, 885 F.2d 639, 640 (9th Cir. 1989).

7 Dismissal of a complaint for failure to state a claim upon which relief may be granted is
8 provided for in Federal Rule of Civil Procedure 12(b)(6), and the court applies the same standard under
9 Section 1915(e)(2) when reviewing the adequacy of a complaint or amended complaint. Review under
10 Rule 12(b)(6) is essentially a ruling on a question of law. *See Chappel v. Laboratory Corp. of America*,
11 232 F.3d 719, 723 (9th Cir. 2000). A complaint must contain more than a “formulaic recitation of the
12 elements of a cause of action;” it must contain factual allegations sufficient to “raise a right to relief
13 above the speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1965
14 (2007). “The pleading must contain something more...than...a statement of facts that merely creates a
15 suspicion [of] a legally cognizable right of action.” *Id.* In reviewing a complaint under this standard,
16 the court must accept as true the allegations of the complaint in question, *Hospital Bldg. Co. v. Rex*
17 *Hospital Trustees*, 425 U.S. 738, 740 (1976), construe the pleading in the light most favorable to
18 plaintiff and resolve all doubts in the plaintiff’s favor. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969).

19 Allegations in a *pro se* complaint are held to less stringent standards than formal
20 pleadings drafted by lawyers. *See Hughes v. Rowe*, 449 U.S. 5, 9 (1980); *Haines v. Kerner*, 404 U.S.
21 519, 520-21 (1972) (*per curiam*); *see also Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th
22 Cir. 1990). All or part of a complaint filed by a prisoner may be dismissed *sua sponte*, however, if the
23 prisoner’s claims lack an arguable basis either in law or in fact. This includes claims based on legal
24 conclusions that are untenable (*e.g.* claims against defendants who are immune from suit or claims of
25 infringement of a legal interest which clearly does not exist), as well as claims based on fanciful factual
26 allegations (*e.g.* fantastic or delusional scenarios). *See Nietzke*, 490 U.S. at 327-28; *see also McKeever*

1 v. *Block*, 932 F.2d 795, 798 (9th Cir. 1991).

2 To sustain an action under section 1983, a plaintiff must show (1) that the conduct
3 complained of was committed by a person acting under color of state law; and (2) that the conduct
4 deprived the plaintiff of a federal constitutional or statutory right.” *Hydrick v. Hunter*, 466 F.3d 676,
5 689 (9th Cir. 2006).

6 **II. Instant Complaint**

7 Plaintiff, who is incarcerated at Ely State Prison (“ESP”), has sued ESP Warden Eldon
8 K. McDaniel. Plaintiff alleges violations of his Fourteenth Amendment due process rights. He alleges
9 the following: on January 20, 2010, plaintiff received a notice of charges with five charges, including
10 assault and battery. On January 29, 2010, on the way to the disciplinary hearing, corrections officer
11 Minnix brought plaintiff to a small hallway and threatened him with physical force if plaintiff did not
12 agree with everything that Minnix “stated and did.” Plaintiff remained silent and refused Minnix’s
13 demands to say, “Yes Lt. Minnix I agree to whatever you do.” Minnix ordered officers to return plaintiff
14 to his cell and conducted the disciplinary hearing without plaintiff, his defense or witnesses. Two days
15 after this incident Minnix was terminated. Plaintiff appealed the sanctions of two years disciplinary
16 segregation and “stat loss” as well as the hearing itself to Warden McDaniel, who refused to order a new
17 hearing or dismiss the charges.

18 “Prisoners . . . may not be deprived of life, liberty or property without due process of law
19 [T]he fact that prisoners retain rights under the Due Process Clause in no way implies that these
20 rights are not subject to restrictions imposed by the nature of the regime to which they have been
21 lawfully committed” *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974). When a prisoner faces
22 disciplinary charges, prison officials must provide the prisoner with (1) a written statement at least
23 twenty-four hours before the disciplinary hearing that includes the charges, a description of the evidence
24 against the prisoner, and an explanation for the disciplinary action taken; (2) an opportunity to present
25 documentary evidence and call witnesses, unless calling witnesses would interfere with institutional
26 security; and (3) legal assistance where the charges are complex or the inmate is illiterate. *See id.* at 563-

70; *see also Superintendent, Mass. Corr. Inst., Walpole v. Hill*, 472 U.S. 445, 454 (1985); *Serrano v. Francis*, 345 F.3d 1071, 1077-78 (9th Cir. 2003); *Neal v. Shimoda*, 131 F.3d 818, 830-31 (9th Cir. 1997); *Walker v. Sumner*, 14 F.3d 1415, 1419-20 (9th Cir. 1994), *abrogated in part on other grounds by Sandin v. Connor*, 515 U.S. 472 (1995); *McFarland v. Cassady*, 779 F.2d 1426, 1428 (9th Cir. 1986), *abrogated in part on other grounds by Sandin*, 515 U.S. 472. Plaintiff states a claim under the Due Process Clause of the Fourteenth Amendment against defendant McDaniel.

III. Conclusion

IT IS THEREFORE ORDERED that the Clerk shall **FILE** the complaint (docket #1-2).

IT IS FURTHER ORDERED that plaintiff's claims **MAY PROCEED**.

IT IS FURTHER ORDERED as follows:

1. The Clerk shall electronically serve a copy of this order, including the attached Notice of Intent to Proceed with Mediation form, along with a copy of plaintiff's complaint, on the Office of the Attorney General of the State of Nevada, to the attention of Pamela Sharp.

2. The Attorney General's Office shall advise the Court within **twenty-one (21) days** of the date of entry of this order whether it can accept service of process for the named defendants. As to any of the named defendants for which the Attorney General's Office cannot accept service, the Office shall file, *under seal*, the last known address(es) of those defendant(s).

3. If service cannot be accepted for any of the named defendant(s), plaintiff shall file a motion identifying the unserved defendant(s), requesting issuance of a summons, and specifying a full name and address for said defendant(s). Plaintiff is reminded that, pursuant to Rule 4(m) of the Federal Rules of Civil Procedure, service must be accomplished within one hundred twenty (120) days of the date the complaint was filed.

4. If the Attorney General accepts service of process for any named defendant(s), such defendant(s) shall file and serve an answer or other response to the complaint within **thirty (30) days** following the date of the early inmate mediation. If the court declines to mediate this case, an answer

1 or other response shall be due within **thirty (30) days** following the order declining mediation.

2 5. The parties **SHALL DETACH, COMPLETE, AND FILE** the attached Notice of Intent to
3 Proceed with Mediation form on or before **thirty (30) days** from the date of entry of this order.

4 **IT IS FURTHER ORDERED** that henceforth, plaintiff shall serve upon defendants, or,
5 if an appearance has been made by counsel, upon their attorney(s), a copy of every pleading, motion, or
6 other document submitted for consideration by the court. Plaintiff shall include with the original paper
7 submitted for filing a certificate stating the date that a true and correct copy of the document was mailed
8 to the defendants or counsel for defendants. If counsel has entered a notice of appearance, the plaintiff
9 shall direct service to the individual attorney named in the notice of appearance, at the address stated
10 therein. The court may disregard any paper received by a district judge or a magistrate judge that has
11 not been filed with the Clerk, and any paper which fails to include a certificate showing proper service.

12 **IT IS FURTHER ORDERED** that plaintiff's motion to strike State of Nevada and
13 Nevada Department of Corrections from complaint (docket #6) is **GRANTED**.

14
15 DATED this 16th day of December, 2010.

16
17 Valerie P. Baker
18 UNITED STATES MAGISTRATE JUDGE
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2
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4 Name _____

5 Prison Number _____

6 Address _____
7 _____

8 UNITED STATES DISTRICT COURT
9 DISTRICT OF NEVADA

10 _____,)
11 Plaintiff,)

12 v.)

13 _____)
14 Defendants.)

Case No. _____

**NOTICE OF INTENT TO
PROCEED WITH MEDIATION**

15 This case may be referred to the District of Nevada's early inmate mediation program. The
16 purpose of this notice is to assess the suitability of this case for mediation. Mediation is a process by
17 which the parties meet with an impartial court-appointed mediator in an effort to bring about an
18 expedient resolution that is satisfactory to all parties.

19 1. Do you wish to proceed to early mediation in this case? ____ Yes ____ No

20 2. If no, please state the reason(s) you do not wish to proceed with mediation? _____
21 _____
22 _____

23 3. List any and all cases, including the case number, that plaintiff has filed in federal or state court
24 in the last five years and the nature of each case. (Attach additional pages if needed).
25 _____
26 _____

1 4. List any and all cases, including the case number, that are currently pending or any pending
2 grievances concerning issues or claims raised in this case. (Attach additional pages if needed).

3 _____
4 _____
5 _____

6 5. Are there any other comments you would like to express to the court about whether this case is
7 suitable for mediation. You may include a brief statement as to why you believe this case is
8 suitable for mediation. (Attach additional pages if needed).

9 _____
10 _____
11 _____

12 **This form shall be filed with the Clerk of the Court on or before thirty (30) days from the
13 date of this order.**

14 **Counsel for defendants:** By signing this form you are certifying to the court that you have
15 consulted with a representative of the Nevada Department of Corrections concerning participation in
16 mediation.

17 Dated this ____ day of _____, 20____.

18 _____
19 Signature

20 _____
21 Name of person who prepared or
22 helped prepare this document
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